



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Kwach, Bosire & Keiwua JJ A)**

**CIVIL APPEAL NO 9 OF 2001**

**MARGARET NJERI MUIRURI** (Being the Administrator of

the Estate of Joseph Muiruri (Deceased)) ..... **APPELLANT**

**VERSUS**

**BANK OF BARODA (KENYA) LIMITED** ..... **RESPONDENT**

(An appeal from the High Court at Milimani Commercial Courts

(Hon Justice PJ Hewett) dated 21st day of November 2000)

**JUDGMENT**

Margaret Njeri Muiruri, the appellant, as administrator of the estate of Joseph Muiruri, deceased, unsuccessfully applied to the superior court for an interlocutory injunction to restrain Bank of Baroda (Kenya) Limited, the respondent, by itself, its agents and assigns from selling property known as LR No 36/IV/14(20A) situated at Eastleigh, Nairobi, or dealing with the said property in any other manner. She was aggrieved and hence the present appeal.

In her suit in the superior court the appellant alleged that the respondent, as mortgagee of the above property, had taken steps to realize its security without giving the requisite statutory notice and notwithstanding the fact that she had undertaken to settle the mortgagor's indebtedness to the respondent on certain proposed terms.

The principles to guide a trial court in determining whether or not to grant an interlocutory injunction are well known and are summarised in the often cited case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358. The applicant must show not only that he has a *prima facie* case with the probability of success upon trial, but also, that unless he is granted an injunction he will suffer such damage or injury unlikely to be adequately compensated in damages. Where the Court entertains a doubt in either of the above principles it is required to consider the balance of convenience, viz, whether the balance of convenience will favour the grant or refusal of the injunction prayed for.

The suit property was given by the deceased to secure repayment by a company known as Central Kenya Agencies Limited, of a loan and overdraft from the respondent, totalling about Kshs 6 million. The appellant conceded in the superior court that the said company had not fully repaid the money lent. She, however, complained that the respondent had taken steps with a view to selling the said property without

the requisite statutory notice, that her attempts to negotiate with the respondent to pay a certain fraction of the amount, which the respondent alleges to be due, in full and final settlement of the debt had been thwarted by the respondent's refusal to negotiate.

The respondent through its counsel on record, Mr Nyamu, conceded both before the trial court and before us that the respondent had not served the appellant with any statutory notice. Learned counsel, however, contended that because the respondent in taking steps to sell the suit property was acting pursuant to the provisions of section 69A(1)(b) of the Transfer of Property Act, no such notice was necessary. Section 69A(1)(b), aforesaid, provides, in pertinent part, as follows:

“69A(1)A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until -

(a) ...

(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or...”

Mr Nyamu, submitted before us that when proceeding under the above paragraph a mortgagee need not serve the mortgagor with any notice. It may proceed to advertise the sale of the property or enter into a sale by private treaty of the property without serving any notice. In his view a statutory notice is only required where the mortgage money is in arrear, and not where only interest is due and unpaid.

Mr Muriithi for the appellant submitted before us that the relevant legislation is silent on when interest is deemed to be due. Consequently he said the parties and the Court must fall back on the mortgage instrument for guidance. In his view, the mortgage instrument requires that there should be a formal demand before the mortgagee takes steps to realize its security, which demand had not been made, he said.

Determination of the present appeal depends largely on whether under section 69A(1)(b) above, some form of notice was essential before the respondent could exercise its statutory power of sale. We remind ourselves that this is an interlocutory appeal. So we have to exercise due caution so that we do not finally determine issues which properly should be left to the trial court.

A careful reading of section 69A(1), above, raises several issues, to which the trial judge did not address his collective mind. The learned judge upheld the respondent's submission that the appellant's case fell within the ambit of section 69A(1)(b), but he failed to state upon what basis he came to that conclusion. According to the facts before him, only Kshs 6 million had been lent to Central Kenya Agencies Limited. The appellant deponed in her affidavit in support of her injunction application that over Kshs 11 million had been paid towards settling that debt. The total being demanded presently is about Kshs.90 million. The record of appeal does not have any evidence as to how much of that sum constitutes interest and how much the principal sum.

In a separate suit by Central Kenya Agency Ltd against the respondent, to wit High Court Civil Case No 6090 of 1993, the respondent's firm of advocates addressed a letter to all the guarantors of the loan in the following terms:

“Dear Sir/Madam.

High Court Civil Case Number 6090 of 1993 Central Kenya Agency Limited versus Bank of Baroda (K) Limited.

We act for Bank of Baroda(K) Limited. By a guarantee dated the 22nd October, 1986 you jointly guaranteed payment to our client of all monies due from Central Kenya Agency Limited. By a mortgage dated 22nd October, 1986, Joseph Muiruri Gachika *inter alia* charged LR 36/IV/14 as security for the repayment of such debt. Central Kenya Agency Limited is currently indebted to our client in the sum of Shs 30,481,061.10 which sum carries further interest at 45% per annum from the 1<sup>st</sup> January, 1997.

We hereby demand immediate payment of this sum from both of you as guarantors. Please note that if payment is not made we will take immediate steps for the realisation of our client's security over the said LR 36/IV/14.

Yours faithfully

Hamilton Harrison & Mathews

KA FRASER”

This is the only letter on record which not only sets out how the money allegedly owing to the respondent arose, but which also makes a formal demand to pay the same. But the debt therein is not described as arrears of interest. Nor does the letter state when the debt became due. The learned trial judge having not addressed his mind as to how section 69A(1)(b), above, should be invoked, and whether the respondent properly invoked that section in this matter, we think that he had no basis or proper basis for holding that that provision applied. Whether or not interest on the loan had been due and outstanding for over two months, is a matter of evidence. In the absence of any clear evidence on the matter we are of the view, and so hold, that the learned trial judge had no basis upon which to invoke section 69A(1)(b), above, in declining to grant an injunction to the appellant.

Besides, section 69A(1)(a) requires a formal notice to be given to the mortgagor, by the mortgagee before it can realise its security. It is arguable whether a formal notice should also not be given under section 69A(1)(b) notifying the mortgagor that interest had fallen due and remained unpaid for at least two months, before the mortgagee can exercise its statutory power of sale for unpaid interest. The foregoing are matters which, if the trial judge, had addressed his mind to, would have led him to find that a prima facie case with the probability of success had been made out. We appreciate the fact that the jurisdiction of the trial court under order 39 rule 1, the Civil Procedure Rules, under which the appellant's application was brought, is discretionary, and that in cases which concern the exercise of discretionary jurisdiction an appellate court should be slow to interfere unless it is shown that the Court below erred in principle. However, as we have endeavoured to show the trial judge failed to consider certain relevant matters and thus exercised his judicial discretion wrongly. Consequently, he erred in principle.

But will the appellant suffer such damage as may not be compensated in damages unless she is granted an injunction. The suit property is land. Mr Nyamu submitted before us that the said property is commercial and therefore its loss is compensatable in damages. We have no clear evidence on the status of the land. Consequently, there is no proper basis for holding that it is commercial property. Besides disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.

This apart, the evidence before us shows that a relatively small amount of money was borrowed. What is being claimed from the appellant presently is a whopping Kshs 90 million odd. The appellant complains that the respondent is charging, what, in ordinary parlance, appears to be usurious interest rate. In the circumstances, the balance of convenience favours the grant of an injunction to maintain the status quo, so as to give the appellant an opportunity of proving her case. We appreciate that parties to a contract may, as here, agree on the interest chargeable in a financial transaction. It is however, arguable whether it is fair for a party to such an agreement to arbitrarily vary upwards such rate of interest without prior notice to the other party or parties to the agreement.

For the foregoing reasons, we are minded to interfere with the trial judge's exercise of discretion in the present matter. Accordingly, we set aside the order made on 20th December, 2000 dismissing the appellant's injunction application dated 19th October, 2000, and substitute therefore an order restraining the respondent either by itself, its agents, assigns or otherwise from disposing the suit property pending the hearing and determination of High Court (Milimani Commercial Courts) Civil Case No 1857 of 2000 or until further order of this Court. The costs of the appeal and of the motion before the superior court shall be in the cause pending in the superior court.

Dated and Delivered at Nairobi this 5<sup>th</sup> day of December, 2001

**R.O. KWACH**

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**JUDGE OF APPEAL**

**S.E.O BOSIRE**

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**JUDGE OF APPEAL**

**M.M.O. KEIWUA**

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**JUDGE OF APPEAL**